NO. 21575

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAROLD LINCOLN WARD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
BYRON B. KOHN,
Special Assistant U. S. Attorney,

827 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

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COUNTER-STATEMENT OF THE CASE

At approximately 8:00 A.M. on May 6, 1966, Sergeant Victor Zilinsky and Sergeant Lewis Riker of the Los Angeles Police Department went to 3332 Hyde Park Boulevard, Los Angeles, California, in the company of two uniformed police officers [R. T. pp. 15-17]. 1/ In the front of the building at this address was a sign reading "Home TV Service and Repair"; in the rear were living quarters [R. T. p. 16].

Sergeant Zilinsky knew that a warrant had been issued from

1/ R. T. refers to Reporter's Transcript.

the City of West Covina for the arrest of Harold Lincoln Ward on a charge of 476 APC, non-sufficient funds check; in fact, he had personally seen the warrant [R. T. pp. 14, 34]. Harold Lincoln Ward was also a suspect in a check forgery scheme. In late April or early May of 1966, Sergeant Zilinsky had executed a search warrant on the premises at 1525 Evanwood, La Puente, California, Ward's former address, and had found there forged money orders [R. T. p. 24]. On May 2, 1966, Ward had told officers of the Covina Police Department that he resided at the Home TV Service and Repair Shop. This information was made known to the West Covina Police Department which in turn divulged it to Officer Zilinsky [R. T. p. 37].

Sergeant Lewis and a uniformed officer gained entrance to the premises through the rear [R. T. p. 17]. Appellant unlocked the front door and let in Sergeant Zilinsky and another uniformed officer [R. T. pp. 16-17]. Sergeant Zilinsky had a general description of Harold Lincoln Ward, but this description included a beard and a mustache [R. T. pp. 18, 33]. On May 6, 1966, Appellant was not sporting either a beard or a mustache [R. T. p. 18]. Appellant denied being Harold Lincoln Ward [R. T. p. 18], and instead, claimed to be John Washington [R. T. p. 22]. Therefore, when the officers first gained entry to the Home TV Service and Repair Shop they did not believe Appellant to be Harold Lincoln Ward [R. T. p. 33].

Having identified himself as John Washington, Appellant informed the officers that Ward had gone out to breakfast some ten

minutes earlier [R. T. p. 22]. Still claiming to be John Washington, Appellant told the officers they could wait there for Ward's return and that they could search the premises [R. T. pp. 22-23]. A city business license on the wall indicated that the shop was owned by John Washington [R. T. p. 38]. Appellant fit the description of John Washington contained in the identification papers he had furnished the officers [R. T. pp. 18, 45].

In the course of the search the officers uncovered stolen travelers checks, forged money orders, false identification papers, and a coat containing money hanging on the wall [R. T. p. 24]. Still pretending to be John Washington, Appellant told the officers that the coat and money were his, but that the forged instruments belonged to Ward [R. T. pp. 24-25, 52-53].

Having waited in vain approximately thirty minutes for Ward's return, the officers decided to verify the identity of the person claiming to be John Washington [R. T. pp. 25, 45, 54-55]. Appellant was unable to give the correct birth date of John Washington as shown on the identification papers in that name and then admitted being Harold Lincoln Ward [R. T. pp. 25, 45-46]. The officers arrested Appellant on the basis of the West Covina warrant and on the additional charge of possession of forged instruments in their presence [R. T. pp. 46-47]. Until the arrest Appellant was under no physical restraint [R. T. p. 26]. After the arrest, and having been advised of his constitutional rights, Appellant admitted that the coat and money were his [R. T. p. 26]. The officers completed their search and then took Appellant to the Police

Administration Building, where he was booked at approximately 1:30 P. M. [R. T. p. 27]. The entire search lasted approximately one hour and a half to one hour and three quarters [R. T. p. 25].

At the Police Administration Building Appellant was permitted to telephone a bondsman; he stated that he did not want to call an attorney [R. T. p. 27]. It was not until the officers returned to the Police Administration Building that they learned about the bank robbery and of Appellant's probable participation in it [R. T. pp. 28-30].

Appellant testified that he did not spend the night of May 5 at the Home TV Service and Repair Shop; that he arrived there only at about 5:00 A. M. on May 6 [R. T. p. 63]. Although Appellant at first denied consenting to the search [R. T. p. 51], he did admit letting in the police and telling them they could wait there for Ward's return [R. T. pp. 63-65]. Appellant knew the police were probably looking for him and only mildly protested their search [R. T. pp. 64-65]. Although Appellant claimed the police would not let him make a telephone call, he stated that he did not tell them he wanted to [R. T. pp. 66-67]. Appellant spoke to the officers freely and of his own will [R. T. pp. 69-70]. Appellant admitted three previous felony convictions, including armed robbery, interstate transportation of forged securities, and possession of narcotics [R. T. p. 72].

On May 23, 1966, while in State custody, Appellant wrote a letter to the United States District Court. In a reply letter dated June 1, 1966, the Clerk of the United States District Court,

explained that his office had no knowledge of any Federal case involving Appellant and suggested that he contact the United States Commissioner [T. R. p. 9]. 2/ In a letter dated June 2, 1966, responding to Appellant's letters dated June 2 and June 4, 1966, the United States Commissioner explained that a Federal detainer had been filed against Appellant, that recommended bond in the Federal matter was $25,000, but that the Federal matter would not proceed until the State charges had been disposed of [T. R. p. 10]. On June 8, 1966, the Federal Grand Jury returned the indictment on which Appellant was tried. Bond on that indictment was recommended at $20,000 [T. R. p. 2]. In any event, Appellant was unable to make the Federal bond [R. T. p. 62].

Susan M. Smith testified that on May 5, 1966, she was employed as a teller at the Washington-West View branch of the Crocker-Citizens National Bank [R. T. p. 113]. At approximately 1:00 P. M., an individual approached her window and placed a hold-up note, Exhibit 1, on the counter [R. T. p. 114]. Miss Smith identified this individual as Appellant [R. T. pp. 120-121]. He was wearing on this occasion either a dirty plaid-type shirt or a workshirt [R. T. p. 124]. She started to ask Appellant where his bag was, but he cut her off, telling her to get the money quickly [R. T. pp. 130-131]. Miss Smith was positive that Appellant did not smile and that he said nothing about any bag [R. T. p. 132]. Appellant kept one hand on the counter covered by a hat and Miss

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2/ T. R. refers to Transmitted Record.

Smith never saw what, if anything, was in the hand beneath the hat [R. T. pp. 133-134]. In giving Appellant the money, Miss Smith tripped an alarm system which took photographs of the robbery [R. T. p. 118]. She then identified these photographs, Exhibit 2, as accurately portraying what transpired [R. T. pp. 119-120]. Miss Smith further testified that she gave Appellant certain "bait money", Exhibit 3, which was kept segregated from the bank's regular funds [R. T. pp. 118-119]. As he was leaving, Appellant told Miss Smith to "Be quiet" or "Be careful" [R. T. p. 118]. Miss Smith picked up the hold-up note only when it was first presented to her [R. T. p. 137]. The police handled the note in such manner as not to damage any latent finger prints [R. T. pp. 138-139].

To discredit the testimony of Miss Smith by means of a prior inconsistent statement, Appellant called Federal Bureau of Investigation Special Agent Thomas W. Lenehan [R. T. p. 220]. However, Agent Lenehan testified that Miss Smith never told him she could see both of Appellant's hands [R. T. p. 223].

Gerald A. Blum, Assistant Manager at the Washington-West View branch of the Crocker-Citizens National Bank, testified as to the purpose and nature of the "bait money" transfer card [R. T. pp. 151-152]. Such card is prepared and maintained in the ordinary course of the bank's business [R. T. p. 168]. Miss Smith signed the card on April 20, 1966, and the same "bait money" was charged to her on May 5, 1966 [R. T. p. 153]. Verification of the transfer card was made in March of 1966 [R. T. p. 170]. From the time of verification until May 5, 1966, there were no

robberies at the bank [R. T. p. 171].

Warren Anderson of the Los Angeles Police Department testified to the taking of Appellant's fingerprints [R. T. p. 173]. Leroy A. Howe of the Los Angeles Police Department testified to the processing for latent fingerprints of the hold-up note [R. T. pp. 178-179]. John Walker, a Federal Bureau of Investigation expert on fingerprints, testified at length regarding his comparison of Appellant's fingerprints with those on the hold-up note. There were no identifiable fingerprints on the note other than those of Appellant [R. T. p. 208].

The Government and Appellant stipulated that the Crocker-Citizens National Bank is a member of the Federal Reserve System and is insured by the Federal Deposit Insurance Corporation [R. T. pp. 210-211].

Appellant took the stand in his own behalf. He admitted writing the hold-up note [R. T. p. 232], and he admitted committing the robbery [R. T. p. 226]. He admitted prior felony convictions for armed robbery, possession of narcotics, and interstate transportation of forged securities. According to Appellant, however, he and Miss Smith smiled at each other and both of his hands were visible to her [R. T. p. 228].

ARGUMENT

I

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS EVIDENCE.

Sergeant Victor Zilinsky testified that Appellant, pretending to be one John Washington [R. T. p. 22], invited the police officers onto the premises and consented to their search [R. T. pp. 22-23]. Until the police learned of Appellant's true identity and then placed him under arrest, Appellant was not subject to any restraint [R. T. p. 26]. The pre-arrest search, during which the police discovered the "bait money" (Exhibit 3), lasted approximately thirty minutes [R. T. pp. 25, 45, 54-55]. Appellant admitted letting the police onto the premises [R. T. pp. 63-65], but denied consenting to any search [R. T. p. 51].

The Court below was thus presented with conflicting evidence regarding the question of consent to search. Unless "clearly erroneous", this Court will not reverse a determination by the trial Court that consent to search was given. Menefield v. United States, 355 F. 2d 662 (9th Cir. 1966); United States v. Page, 302 F. 2d 81 (9th Cir. 1962). Here, the trial Court was certainly justified in disbelieving Appellant's denial of consent; especially in light of the fact he admitted to three prior felony convictions [R. T. p. 72].

In United States v. Page, supra at page 84, this Court commented:

"It is still true, however, that it is the trial judge who hears the witnesses and who must pass upon their credibility. We sometimes tend to forget that the testimony of a witness, presented to us in a cold record, may make an impression upon us directly contrary to that which we would have received had we seen and heard the witness. It ought not to be assumed that United States District Court Judges are any less determined to preserve constitutional rights than we are. They, too, are sworn to uphold the Constitution."

If, however, this Court should determine that Appellant did not consent to the search, it is submitted that the search was nevertheless valid and that, therefore, the trial Court did not err in denying Appellant's motion to suppress.

Sergeant Zilinsky went to the Home TV Service and Repair shop knowing that there was an outstanding warrant for Appellant's arrest [R. T. pp. 14, 34]. Appellant, knowing that the police were probably looking for him [R. T. p. 65], pretended to be someone else [R. T. pp. 18, 22]. When the police first gained entry to the Home TV Service and Repair shop they did not believe Appellant to be Harold Lincoln Ward [R. T. p. 33]. However, as soon as the police ascertained Appellant's true identity, they placed him under arrest [R. T. pp. 46-47]. Had not Appellant initially pretended to be John Washington, the police would have arrested him immediately

and the subsequent search would have been proper as incident to a valid arrest. United States v. Rabinowitz, 339 U.S. 56 (1950). Appellant should not now be permitted to profit from his deception of the police officers and from his attempt to obstruct them in the performance of their lawful duty.

Where, as here, the police have adequate independent grounds to arrest a suspect, the fact that the search precedes the actual arrest does not necessarily render such search invalid. Cipres v. United States, 343 F.2d 95 (9th Cir. 1965); Holt v. Simpson, 340 F.2d 853 (7th Cir. 1965). Such is certainly the law in California. People of State of California v. Hurst, 325 F.2d 891 (9th Cir. 1963), reversed on other grounds 381 U.S. 760 (1965); People v. Cockrell, 63 Cal.2d 659, 47 Cal.Rptr. 788, 408 P.2d 116 (1965); Wilson v. Superior Court, 46 Cal.2d 291, 294 P.2d 361 (1956). Since Appellant was himself responsible for the search preceding the arrest, he should not now be heard to complain of any impropriety.

The cases cited by Appellant do not require this Court to hold the search unlawful. In United States v. Rutheiser, 203 F. Supp. 891 (S.D. N.Y. 1962), the search preceded formal arrest by some three and one-half hours because of misconduct on the part of the officers. Here, the search preceded arrest by only thirty minutes because of Appellant's own misconduct. In People v. Schaumloffel, 53 Cal.2d 96, 346 P.2d 393 (1959), the police conducted a general and exploratory search resulting in the seizure of confidential records unconnected with the offense for which

defendant was arrested. Here, the police officers could reasonably conclude that the "bait money" which they seized was the fruit of Appellant's illegal activity.

II

THERE WAS NO UNNECESSARY DELAY IN BRINGING APPELLANT BEFORE THE NEAREST AVAILABLE COMMISSIONER.

Appellant concedes, as indeed he must, that Rule 5 of the Federal Rules of Criminal Procedure does not apply to an accused held in State custody. Lovelace v. United States, 357 F. 2d 306 (5th Cir. 1966); Young v. United States, 344 F. 2d 1006 (8th Cir. 1965), cert. denied 382 U. S. 867 (1965); Swift v. United States, 314 F. 2d 860 (10th Cir. 1963); Watts v. United States, 273 F. 2d 10 (9th Cir. 1960), cert. denied 362 U. S. 982 (1960); Carpenter v. United States, 264 F. 2d 565 (4th Cir. 1959). An exception to this general proposition is recognized when there is collusion between the Federal and State authorities. Anderson v. United States, 318 U. S. 350 (1943). However, there must be more than mere suspicion of such collusion. Young v. United States, supra. Here, there cannot even be the slightest suspicion of any collusion between Federal and State authorities.

Appellant was arrested by Los Angeles Police Department officers on State charges unrelated to the Federal offense involved here [R. T. pp. 46-47]. The police officers did not even learn of the bank robbery and of Appellant's probable participation in it

until after the arrest when they had taken him to the Police Administration Building for booking [R. T. pp. 28-30]. Appellant has cited no authority requiring Federal officers to discontinue their own investigation while an accused is in State custody.

Nor was Appellant mislead by the United States Commissioner. In a letter dated June 2, 1966, the Commissioner explained to Appellant that a Federal detainer had been filed against him, that bond was recommenced at $25,000, but that there would be no proceedings, that is, a preliminary hearing, on this Federal matter until the State charges had been disposed of [T. R. p. 10]. However, on June 8, 1966, the Federal Grand Jury returned the indictment on which Appellant was tried and convicted [T. R. p. 2]. Return of this indictment, a different matter from the Federal detainer, obviated the necessity for any preliminary hearing. United States v. Smith, 357 F. 2d 318 (6th Cir. 1966); Crump v. Anderson, 352 F. 2d 649 (D. C. Cir. 1965); Byrnes v. United States, 327 F. 2d 825 (9th Cir. 1964), cert. denied 377 U. S. 970 (1964).

Bond was set in the State matter, but Appellant was unable to make it because of the additional bond required on the Federal detainer [R. T. pp. 58-59; T. R. p. 10]. Whether or not Appellant was brought before a State magistrate was not raised below and is, therefore, not reviewable here. United States v. Miller, 353 F. 2d 724 (2nd Cir. 1965); Williams v. United States, 308 F. 2d 652 (D. C. Cir. 1962), cert. denied 372 U. S. 970 (1963). For the foregoing reasons, the trial Court did not err in denying Appellant's motion to dismiss.

III

THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE THE PHOTOGRAPHS, THE TRANSFER LEDGER, THE "BAIT MONEY", OR THE HOLD-UP NOTE.

The adequacy of the foundation for the reception of evidence is a matter which rests largely in the discretion of the trial Court. Moyer v. United States, 312 F. 2d 302 (9th Cir. 1963); Brandow v. United States, 268 F. 2d 559 (9th Cir. 1959); Arena v. United States, 226 F. 2d 227 (9th Cir. 1955), cert. denied 350 U.S. 954 (1956). Regarding none of the items about which Appellant complains was the trial Court's ruling clearly an abuse of discretion.

Susan Smith testified that the photographs, Exhibit 2, accurately represented the situation at the bank at the time of the robbery [R. T. pp. 119-120]. Although Miss Smith saw Appellant's back as he was leaving the bank, she did not keep her eye on him during every instant of his departure [R. T. pp. 135-136]. However, a witness called to qualify a photograph need not even have been present when it was taken; he need only be able to state that the photograph fairly and correctly represents the object depicted. Kleveland v. United States, 345 F. 2d 134 (2nd Cir. 1965). Whether the witness' testimony adequately qualifies the photograph is a matter which should be left to the trial Court. Wigmore, Evidence (3rd ed.) §794 at p. 187. It is submitted that Miss Smith's momentary distraction does not render her qualification of the photographs insufficient.

Gerald A. Blum testified that the transfer ledger was prepared when the "bait money" was first transferred to a teller's window [R. T. p. 169]; that when a new teller takes over the window he checks the "bait money" and signs the ledger [R. T. p. 154]; that Susan Smith signed the ledger on April 20, 1966 [R. T. p. 153]; that there was a verification of the "bait money" in March of 1966 [R. T. p. 170]; that there were no robberies of that particular teller's window between the time of verification and May 5, 1966 [R. T. p. 170]; and that the transfer ledger was a regular record kept in the ordinary course of the bank's business [R. T. p. 168]. Clearly, the transfer ledger, Exhibit 9, was admitted into evidence upon a proper and adequate foundation. Helms v. United States, 310 F. 2d 236 (5th Cir. 1962).

The fact that neither Mr. Blum nor Miss Smith had personal knowledge of the serial numbers of the "bait money" does not effect the admissibility into evidence of that money. It is just because of this situation that the transfer ledger was produced.

Susan Smith identified Exhibit 1 as the hold-up note which Appellant handed to her [R. T. pp. 114-115]. She left the note on the counter [R. T. p. 138] and precautions were taken to preserve fingerprints [R. T. p. 136]. The fact that the note was momentarily out of her sight does not effect its admissibility. West v. United States, 359 F. 2d 50 (8th Cir. 1966); Brewer v. United States, 353 F. 2d 260 (8th Cir. 1966); Gallego v. United States, 276 F. 2d 914 (9th Cir. 1960).

IV

THERE WAS SUFFICIENT EVIDENCE FROM WHICH THE JURY MIGHT CONCLUDE THAT APPELLANT THROUGH FORCE AND VIOLENCE AND INTIMIDATION TOOK THE MONEY BELONGING TO THE CROCKER CITIZENS NATIONAL BANK.

Susan Smith testified that Appellant did not smile at her nor did he say anything about a bag [R. T. p. 132]. She never saw the hand beneath the hat [R. T. p. 134]. As he was leaving the bank, Appellant told Miss Smith to "Be Careful" or "Be quiet" [R. T. p. 118]. She was scared [R. T. p. 117].

Appellant, testifying in his own behalf, admitted writing the hold-up note [R. T. p. 232] and admitted committing the robbery [R. T. p. 226]. He admitted prior felony convictions for armed robbery, possession of narcotics, and interstate transportation of forged securities. According to Appellant, however, he and Miss Smith smiled at each other [R. T. p. 228].

The testimony of Susan Smith, if believed, sufficiently establishes that Appellant through force and violence and intimidation took the money belonging to the Crocker Citizens National Bank. Indeed, the offense is sufficiently established by the hold-up note itself: "Keep quiet and you won't get hurt." United States v. Baker, 129 F. Supp. 684 (S.D. Calif. 1955). Appellant's attack on the sufficiency of the evidence goes largely to the credibility of Susan Smith as against that of Appellant. Under the circumstances of this case, the jury was fully justified in believing Miss Smith

rather than Appellant. It is elementary that a Court of Appeals should not usurp the function of the trier of fact who has had an opportunity to hear the witnesses and judge their demeanor. Hiram v. United States, 354 F.2d 4 (9th Cir. 1965); Davis v. United States, 327 F.2d 301 (9th Cir. 1964); Lyda v. United States, 321 F.2d 788 (9th Cir. 1963).

CONCLUSION

In conclusion, the Government respectfully submits that Appellant's conviction should be affirmed.

Respectfully submitted:

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

BYRON B. KOHN,
Special Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Byron B. Kohn
BYRON B. KOHN